CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI.

MARCH TERM, 1873, AT ST. LOUIS MO.

(CONTINUED FROM VOL LII.)

PACIFIC RAILROAD CO., Appellant, *vs.* CASS COUNTY, *et al.*, Respondents.

1. *Revenue—Taxation—Exemption from—Presumptions.*—Where exemption from taxation is claimed under any law, it must not be from presumption. The abandonment of the sovereign right to exercise this vital power, can never be presumed; the intention to abandon it must appear in the most clear and unequivocal terms.
2. *Statute, construction of—Repeal—Later general affirmative statute does not repeal former which is particular, except when.*—A statute can only be repealed by express provision of a subsequent law, or by necessary implication. To repeal a statute by implication there must be such a positive repugnancy between the new law and the old, that they cannot stand together or be consistently reconciled. There should be a manifest and total repugnancy in the provisions of the new law, to lead to the conclusion that the later law abrogated, or was designed to abrogate the former. A later statute which is general and affirmative, does not abrogate a former one which is particular, unless negative words are used, or unless the acts are irreconciliably inconsistent.

3. *Revenue—Assessment—Board of Equalization—Notice.*—The Assessor of Cass County for 1869, made no assessment of the property of the Pacific Railroad, and his assessment book when returned, contained no entry in relation to said road. Subsequently, the County Board of Equalization verbally ordered an entry to be made on the assessor's book of an assessment by themselves of taxes against said road for said year, 1869. This order and entry were made without notice to the Railroad. No taxes were charged against the Railroad on the tax-book for 1869, or on the delinquent book for that year, until Dec. 1871, when an entry was made by order of the County Court of that date, without notice to the company, ordering that the assessment made by the Board of Equalization, and the taxes thereon, be placed on the copy made by the clerk for the use of the collector, and that the clerk make out a copy for the use of the collector. *Held*, that such assessment was clearly without authority of law and void. 1st. Because no notice was given as required by the Act of 1868. 2nd. Because the Board had no authority to make an assessment. It had power to increase or diminish the valuation made by the assessor but had no power to make an assessment of its own.

4. *Revenue—Personal property—Where taxable—Railroads—Rolling stock.*—Personal property which is capable of having an actual *situs* is taxable in the county where it is situated; but other personal property which has no *situs* is taxable in the county where the owner resides. Rolling stock of a railroad company which is in a county which is not the legal residence of the corporation, only in transit or temporarily, is not taxable in such county; but is to be assessed and taxed in the county which is the legal residence of such corporation.

Appeal from St. Louis Circuit Court.

J. N. Litton, for Appellant.

I. The mode provided by the Act of December 25th, 1852, § 12, was, when accepted by appellant on January 1st, 1853, the only legal method for collection of taxes for State as distinguished from county purposes.

II. This Act of December 25th, 1852, provided for the collection of taxes due the State for county purposes, not less than for those more technically known as State. (Hannibal & St. Joe. Railroad vs. Shacklett, 30 Mo., 550; State to use of Pacific R. R. vs. Dulle, 37 Mo., 265.)

The tax-bills at bar are identical in all respects with those before the court in the Hannibal & St. Joe. Railroad cases.—Both were for county, as well as other taxes.

No intimation was given in those cases of any distinction between taxes for county and taxes for State purposes.

In the case in 30 Mo., 555, the court says, this act "expressly exempts the Pacific Railroad from taxation, unless in the mode and at the time specified."

The charter of the Hannibal & St. Joe. Railroad, at the time the tax bills which were discussed by this court in those cases were made, was the same in its provisions as this Act of December 25th, 1852.

This Act of December 25th, 1852, continues the complete immunity from taxation granted by the Act of March 1st, 1851, by declaring that the road shall be "exempt from taxation" until completed. This includes county taxes. (Southern R. R. vs. The Mayor, 38 Miss., 334; O'Donnell vs. Barly, 24 Miss., 386.)

The legislature having provided for all taxes up to the completion of the road, in the same breath declares how taxes shall be collected after that time. This special mode of collection must be held to include all taxes. There could be no object in having taxes for county purposes levied in one way, and for State in another. (N. Y. & Erie R. R. vs. Sabin, 26 Penn., 244, is directly in point.)

To still leave the road liable to be taxed and sold by counties in sections, was to inflict the very evils that the mode provided by this act for taxing the road as an entirety was designed to prevent.

The only warrant for the taxation of the road after completion, is the clause that it shall then be "subject to taxation at the rate assessed by the State on other real property," etc. The word "State" here, it is insisted, means counties, townships and other municipalities. But that when the same sentence provides how these taxes shall be collected, it is insisted that the word State means only for taxes for State purposes.

Taxes levied by the State for county and other local purposes, are no less State taxes than those levied for what are technically known as State purposes. (3 Harrison, (N. J.,) 72.)

Either appellant is exempt from all except the latter class of taxes, or all taxes must be collected by return to the State Auditor.

The provision in the Hannibal & St. Joe. R. R. charter was narrower than this, and yet this court held that to provide for all taxes.

The mere fact that the tax is paid into the State Treasury, has been repeatedly held to be no ground for construing similar acts not to include county taxes. (3 Rich. Law, 342; 1 Zabr., 558; 9 Yerger, 499; 5 Ills., 304; 6 Bush. Ky., 127.)

III. There never has been any express repeal of the Act of December 25th, 1852, nor any by implication. (City of St. Louis vs. Insurance Co., 47 Mo., 146.)

IV. If the appellant is taxable for county purposes under the general revenue law, it is clearly taxable under 2 W. S., (1870,) p. 1169, §§ 23, 24, through its capital stock.

Assuredly this court will not hunt for a pretext for double taxation. The Constitution, (Art. II, § 30,) forbids it, and the Hannibal & St. Joe. Railroad cases, before cited, are express and decisive on the point that it cannot be taxed on its property, and through its capital stock also.

If other authorities be desired they are numerous and uniform. (Bangor R. R. vs. Harris, 21 Maine, 534; Gordon's Ex. vs. Baltimore, 5 Gill. Md., 236; Rome R. R. Co. vs. Rome, 14 Geo., 275; New Haven vs. City, 31 Conn., 106; Mayor of Baltimore vs. Balt. & Ohio R. R., 6 Gill. Md., 295; 51 Ills., 304; 3 Rich. Law, 342; Gardner vs. State, 1 Zabr., 558; 5 Ired., 516; 3 Zabr., 500; Farmers' Bank vs. Commonwealth, 6 Bush, Ky., 127.)

V. Cass County had no right to tax any part of the rolling stock. (17 Gratt., 176; Morgan Co. vs. R. R., 14 Ills., 163; 21 Gratt., 604; Wiggins Ferry Co. vs. St. Louis, 11 Wall., U. S., 423.)

VI. The assessment and levy of taxes for 1869, was entirely without warrant.

The county Board of Equalization had no authority to assess property which is not returned to them.

A verbal order is no order.

Lackland Martin & Lackland, for Respondent.

I. The charter of the plaintiff contains no provision exempting plaintiff's property from taxation. (Sess. Acts 1849, p. 219.) The exemption allowed by the act approved March 1, 1851, (Sess. Acts 1851, p. 271, § 6.) expired March 1, 1856.

II. By section 12 of the act approved December 25, 1852, (Sess. Acts of 1852, 10,) the road-bed, buildings, machinery, engines, cars, and other property of plaintiffs are liable to be taxed two years after the completion of the road, whether any dividend shall have been declared or not. The agreed case admits that the road was completed, &c., April 6, 1866. Two years after this date the road-bed, buildings, machinery, engines, cars, and other property, as such are taxable, as the property of the corporation, and nothing whatever is said in any part of the act indicating that the property of the Company shall be taxed through its stock. The property above named belonged to the corporation. The stock is the property of the stockholders and does not belong to the corporation at all.

This 12th section of said act of December 25, 1852, only applies to the State tax. No tax was ever assessed by the auditor, or paid by the company, under this section. The provisions of this section are only cumulative and the act does not pretend to restrict the power of County Court to levy and collect taxes for State and County purposes.

III. Section 9, page 1161, Vol. 2, Wagner's Statutes provides "that all property, personal, by the laws of this State, situate, in the county other than the one in which the owner resides, shall be assessed in such last mentioned County."

The court in this connection is referred to the sections 27 and 28, of the Revenue Statute. (2 W. S., 1169.)

It is apparent that the mode therein prescribed, is only a mode by which taxes are levied and collected of the owners of stock upon the shares of stock owned by them as their own private property. It is in effect the money of the owners of stock which goes to satisfy taxes due upon their own private property, collected through the instrumentality of the corporation. (State of Mo. *ex rel.* N. M. Cent. R. R. Co., vs. Linn

Co. Court, 44 Mo., 504; 42 Mo., 425.) The first section of the Revenue Act, (W. S., 1159,) declares in substance that all property, real and personal, except as stated in the next section shall be liable to taxation.

The exception does not cover the property taxed in this case.

IV. Section 13 Revenue Act, Wagner's Statute, p. 1163, provides for a county board of equalization, consisting of County Clerk, County Surveyor, presiding justice of the County Court and the County Assessor.

The 15th section provides that in case the valuation of property is raised, public notice shall be given by publishing in a newspaper or by posters. There is no raising of valuation in the case.

The 16th section provides that "The County Clerk shall keep an accurate record of the proceedings and orders of the board, and the Assessor shall correct all erroneous assessments, and the Clerk shall adjust the tax books according to the orders of said board, and the orders of the State board of equalization."

If the Assessor omitted the property of plaintiff, this was an error of omission, which could be corrected under section 16, which was accordingly done.

V. Both of these tax bills appeared upon the collector's book, and neither he nor the County of Cass is liable for any irregular or erroneous assessment, if any such there was. See the cases above cited. (Pacific Railroad vs. Dulle, 48 Mo., 282; Walden vs. Dudley, 49 Mo., 419; North Mo. R. R. Co. *et al.* vs. Maguire, 49 Mo., 468; St. Louis Mut. Life Ins. Co. vs. Charter, 47 Mo., 483.)

Ewing, Judge, delivered the opinion of the court.

The respondent having levied certain taxes for State and county purposes against the appellant for the years 1869 and 1870, payment of which was enforced by the seizure and sale of its property as to the taxes of 1870, the object of this proceeding is to determine certain questions of law in relation to

the liability of the road to taxation, and the proper mode of assessment.

The cause was submitted to the Circuit Court at special term, upon an agreed statement of facts upon which a judgment *pro forma* was rendered for the defendant, and again at, General Term; from which the cause is brought here by appeal. The material facts are that the road was completed and in operation in April, 1866, and has never declared a dividend; that on 1st of February, 1868, it made, through its president, its first return to the State Auditor, as required by the act of December 25, 1852; that no taxes were ever assessed thereon by the Auditor, that the road is a continuous line extending from St. Louis to Kansas City, 283 miles, through eleven counties, and operates connecting lines of rail in the State of Kansas. The principal office of the company is in the City of St. Louis, where its directors reside, and hold their meetings, where also its managing officers live and attend to the business of the company, and where its records are kept and its business transacted; that its principal machine shops, car sheds, and repair shops are in said city, and its rolling stock, when not in actual use on the road, is also kept at St. Louis and returned to said city; that it has three freight and passenger depots at way stations in Cass County, where passengers and freight are received and discharged, and no other business is transacted except such as is incidental to the receipt and delivery of freight; that thirteen miles of its track are constructed and located in Cass County, and no rolling stock is in said county, except when in actual transit or while waiting to receive and discharge freight and passengers.

It is also agreed, for the purpose of this suit only, that the assessor of Cass County for 1869, did not make any assessment of any property of the Pacific railroad; that he did not make any return to the County Court, of the original or any copy of his assessment book until March 1869, when he made affidavit of his book and returned it to the county court; and when so returned it contained no entry in relation to the Pacific railroad. Subsequently the county board of equalization

verbally ordered the following entry to be made on part first (real estate part) of said assessor's book.

"The board of equalization of taxes for Cass County, now at this time proceed to assess the Mo. Pacific railroad in Cass Co. for the taxes for the year 1869, and do assess the same as follows"; then follows a statement of the property, being the road-bed in the County, and the County's proportionate share of the rolling stock with the assessed value annexed. No order to that effect appears on the record of proceedings of said board of equalization. The verbal order and its entry in the assessor's book was made without notice to the Pacific railroad either by advertisement in a newspaper or by poster. The assessment of the rolling stock was made by estimating the value of all the rolling stock used on the entire road from St. Louis to Kansas City, (283 miles in length) and then assessing it for Cass County in the ratio of the entire length of the road to the number of miles in that county.

No taxes were charged against the company on the tax book for 1869; and no entries were made in relation to it, on the delinquent tax book for that year, until December 19, 1871, which entry was made under an order of the county court of the same date, and without notice to the company. This order recites that the railroad was assessed for the taxes of 1869, that said taxes were levied by the county court and were extended by the clerk on the assessor's book for that year, but, by neglect of said clerk, they were not placed on the copy thereof, made by the clerk for the use of the collector; and it is ordered that the assessment and the taxes thereon be placed by the clerk on said copy, and on the delinquent tax books and sale book for the taxes of that year, and that the clerk make out a receipt for the same and deliver it to the collector. On the 21st of December, 1871, the collector seized a locomotive and train of cars for the taxes of 1869 and 1870, and in January, 1872, sold them for the taxes of 1870 only. It is further agreed that if there was any irregularity or error in the assessment or taxation of the Pacific railroad for the year 1870, or the proceedings in relation to the sale of their

said property, such that the purchaser of said locomotive and cars would not take a valid title to the same as against said road, then there shall be a judgment for nominal damages and costs against the county and A. C. Brant, as to the taxes of 1870, in favor of the road. But if the court shall be of opinion there were no such irregularities and that a valid title passed by such a sale, and shal. be further of opinion that none of the propositions claimed by the appellant as to the mode and manner of taxation are correct, but are each and all erroneous, then there shall be a judgment against it for one cent and costs. A similar stipulation is made with reference to the assessment and taxation for 1869, and as to the effect of a sale of property for the taxes of that year in case a sale has been made.

The charter of the plaintiffs granted March 12th, 1849 contains no provision exempting its property from taxation, (Sess. Acts 1849, p. 219.)

By an act amendatory of the charter, approved March, 1851 (Sess. Acts 1851, p. 271,) it provided, that the capital stock together with all machines, wagons, cars, engines and carriages belonging to the company,together with all their works and other property and profits which shall arise from the same, shall be vested in the respective shareholders of the company forever, in proportion to their respective shares, and the same shall be deemed personal estate and shall be exempt from all public charge or tax whatsoever,for the period of five years from the passage of the act. This exemption expired in March, 1856. An act was passed Dec. 25th, 1852, (Sess. Acts 1852, p. 10,) to accept a grant of land made to the State by Congress to aid in the construction of certain railroads and to apply a portion thereof to the Pacific railroad. Section 12 of this act is substantially as follows: 1. The Pacific and Southwest branch railroads are respectively exempt from taxation, until the same shall be completed and opened and in operation, and shall declare a dividend.

2. When this shall have been done, then the road-bed buildings, machinery, engines, cars and other property of such

road shall be subject to taxation at the actual cash value thereof, at the same rate assessed by the State on other property of like value. And, for the purpose of ascertaining the value of said property, the president of the company is required on the 1st of February in each year after the road is completed, opened, put in operation and declares a dividend, to furnish to the auditor a sworn statement, showing the actual value of the property of the road above mentioned. From this statement the company is to be charged by the auditor with the amount appearing to be due to the State. A failure to pay the amount so charged into the State treasury after the expiration of thirty days, subjects the company to a forfeiture of ten per cent. per month on the amount charged. The company also becomes liable to forfeit and pay $10,000, on the failure of the president to furnish the statement referred to.

It is further provided, that if the company shall fail for two years after said roads are respectively completed and put in operation, to declare a dividend, then they shall no longer be exempt from the payment of said tax, nor from the forfeitures and penalties therein imposed.

It is admitted that the road was completed, &c., in April, 1866.

1. It is maintained that on Jany. 1st, 1853, when the act of 1852 was accepted by the appellant, the only legal method for the collection of taxes from it for State purposes was that prescribed by said act, and that it is still in force, and that by virtue of that act the corporation is exempt from taxation for county purposes.

The temporary exemption of the company from taxes under that act, it may be conceded, was broad enough to apply to all taxes whatever. But this exemption ceased on the completion of the road, and then its property became liable to tax in the manner prescribed by this act. The tax was to be paid to the State, and to be paid into the State treasury. The valuation is made by the president of the company, and from the statement furnished by him the Auditor shall charge the company with the amount appearing to be due to the State

and in case of a failure on the part of the company to pay the amount so charged into the State treasury, certain penalties are incurred. If there is any exemption from county or other taxes it is certainly not expressed, nor is there anything in the language that imports such exemption in the remotest degree. We are not at liberty to presume that such was the intention of the legislature.

The abandonment of the sovereign right to exercise this vital power can never be presumed. The intention to abandon it, must appear in the most clear and unequivocal terms. (City of Lexington vs. Aull 30 Mo., 480; Providence Bank vs., Billings, 4 Pet., 561; Gordon vs. Appeal Tax Court, 3 How., 133; Christ Church vs. Philadelphia, 24 How., 300; Jefferson Branch vs. Skelly, 1 Black., 447; Washington University vs Rouse, 42 Mo., 321.)

When this act was passed there was a provision in the general revenue law, which had long been in force, and is still in force, that empowered the several county courts to levy such sums annually as were necessary to defray the expenses of their counties, by a tax upon all property made taxable by law (with certain exceptions that do not affect this case) for State purposes,but which could not "exceed the State revenue tax on the same subjects of taxation" more than a certain per centum therein named. As the act of 1852 modified the general revenue law as to the mode of levying the State tax so far as the appellant was concerned, these acts are to be construed as in *pari materia*, the former law making special provision with regard to the mode of levying the tax "due the State," differing from that prescribed by the general revenue law, and using language which recognized the distinction between a State tax and a tax for county purposes.

As these terms are used in that law, an intention to exempt the company from taxation for county purposes, is as clearly negatived as if it had been expressed in so many words.

The silence of the act in reference to county and other local taxes, is as significant as its clear expression is in reference to State taxes.

2. It is conceded that there has been no express repeal of the act of December 1852, or that part of it relating to the taxation of appellant, and we have not been referred to any statute nor have we seen any provision, which, by any fair or reasonable construction, has this effect. A statute can be repealed only by an express provision of a subsequent law, or by necessary implication.

To repeal a statute by implication there must be such a positive repugnancy between the provisions of the new law and the old, that they cannot stand together, or be consistently reconciled. There should be a manifest and total repugnancy in the provisions of the new law, to lead to the conclusion that the latter law abrogated or was designed to abrogate the former.

A later statute which is general and affirmative, does not abrogate a former one which is particular, unless negative words are used or unless the acts are irreconcilably inconsistent. (Sedgw. Stat. & Const. Law, 123; Duar. Stat., 532–33; 37 Mo., 597; State *ex rel.* Mo. & Miss. R. R. Co., vs Macon Co., 41 Mo., 453.)

The Constitution provides that no property real or personal shall be exempt from taxation except such as may be used for certain purposes therein mentioned. The revenue law of 1868, (Sec., 1 Art., 1) declares that taxes shall be levied on all property, real and personal, except as stated in the next section. (W. S., 1159.)

It is also provided that the property of manufacturing companies and other corporations named in chapter 69, of the General Statutes shall be assessed and taxed in the same manner as the property of individuals. (W. S., p. 1160, § 4.)

In another section provision is made for taxing shares of stock in banks and other incorporated companies, taxable by law in the name of the corporation. (W. S., p. 1169, § 22.)

This provision has been in all the revenue laws since 1845. In none of the revenue laws which have been enacted since that time, is there any reference to railroad corporations *eo nomine*, and when, as in the act of 1865, and re-enacted in

1868, a more particular classification of corporations was made with reference to taxation, the silence of the act as to railroad corporations is still further significant of the intention of the Legislature to leave them subject to the laws which made special provision for levying a tax upon them for State purposes. Section 4 in the act of 1868, before referred to, which designates the mode by which certain classes of corporations, mentioned in chapter 69 of the General Statutes, shall be taxed, does not in my opinion, apply to railroads. But if it does, it is not inconsistent with the 12th section of the act of 1852, before referred to, as to the mode of taxing the property of the appellant for State purposes.

3. But it is insisted, that if county taxes were collectable for 1869 and 1870, under the General Revenue Law by the counties, the property of the appellant is only taxable through its capital stock. If this position is tenable, it pre-supposes a repeal of the 12th section of the law of 1852, a proposition which is strenuously resisted by the learned counsel, for otherwise the company would be taxed by the State, through its visible property, and by the counties in the form of stock.

It also urged, that if the appellant's property is taxable by the counties, this would be the imposition of a double tax. This is true in a certain sense, that is, it is the imposition of an additional tax on the same property, but not for the same purpose. And as we have seen that there was no limit in the charter or in the act of 1852, upon the power of the Legislature, to subject the corporation to taxation for county purposes, the tax could be legally imposed. (State vs. H. & St. Joseph R. R. Co., 37 Mo., 265.)

4. The assessment of the taxes for the year 1869, was clearly without authority of law and void. If it be conceded that the board of equalization had the authority to assess the property of the appellant, which had been omitted by the assessor, they failed to comply with the law in respect to giving notice to the appellant of this assessment. The act of 1868 provides that the board shall raise or diminish the valuation of all such tracts or parcels of land and any personal property, as, in their

opinion have been returned below or above their real value, according to the rate prescribed by the act for such valuation. But after the board shall have raised the valuation of such real estate, it shall give public notice of the fact, specifying the property and the amount raised, either by advertisement in a newspaper in the county, or if there be none, then by posters, one to be put up in each township; and that said board shall meet on a certain day, (therein named) to hear reasons if any be given, why such increase should not be made.

In the agreed statements of facts it is admitted, that no notice was given in any form, and that the company had no knowledge of the action of the board whatever.

If such notice is required where there has been a regular assessment of the property by the assessor, the valuation of which the board has thought proper to increase, it is certainly of equal importance at least, to the tax-payer, that he should have notice, when the board has assumed the functions of the assessor, and placed their own valuation upon the property.

The board has no discretion to dispense with this notice at pleasure, the law is imperative that it shall be given. But this board has no authority to make the assessment; their duties are restricted to hearing complaints and equalizing the valuation and assessment upon all real and personal property. within the county which is taxable by law. (2 W. S., p. 1163, § 17.) It had power to increase or diminish the valuation made by the assessor, according to the rule prescribed by the law when in its opinion the property had been returned above or below the true value; (W. S. 1163, § 18,) but it had no power to make an assessment of its own.

It is also admitted that no taxes were charged against the railroad on the tax book of 1869, nor were there any entries in relation to this road on the delinquent tax book for that year, (or sale book; these terms being used synonymously in the record,) until December 1871.

It is also admitted that the record of the board of equalization shows no order for the assessment made by it for the year 1869. The assessment being void therefore, and not mere-

ly irregular or erroneous, the cases cited by the counsel for respondent, (Pacific R. R. vs. Dulle, 48 Mo., 282; Walden vs, Dudley, 49 Mo., 419; N. M. R. R., vs. Maguire, *Id.* 468, and 47 Mo., 483;) are not applicable.

5. Was the rolling stock of the corporation subject to taxation in Cass County? It is admitted that the principal office of the company is in St. Louis, where its directors reside and hold their meetings, where its managing officers live, its business is transacted, its principal machine shops and repair shops are situated, and where its rolling stock, when not in actual use on the road, is kept, and to which it is returned.

It is also admitted that there is no rolling stock in Cass County, except when in actual transit or while waiting to receive and discharge freight and passengers.

The statute provides that all property personal by the laws of this State, situated in a county other than the one in which the owner resides, shall be assessed in such last mentioned county. (W. S., Ed. 1870, 1161, § 9.)

It is also provided that every person shall deliver to the assessor a just and true list of all property taxable by law, which he owns or of which he has the charge or management, being in any county of the State. (2 W. S., 1167, § 11.)

By another section, the list delivered under the preceding section 11, to the assessor, is to be transmitted to the assessor of the county in which such property may be, who shall assess the same as other taxable property therein. (W. S., 1168, § 16.)

While this provision authorizes the taxing of personal property being in a county in which the owner does not reside, it probably refers to such property as is capable of having an actual *situs*, separate from the person or domicil of the owner, and to some extent kept, used or maintained in such county, and not there casually or temporarily. It obviously cannot apply to the rolling stock of this corporation, which is only in the county when in actual transit or when temporarily detained to receive and discharge freight and passengers.

Upon this state of facts, I am of opinion, that for the purpo-

ses of taxation (as it regards its rolling stock) the corporation must be considered as having its residence in St. Louis, and there alone this property is liable to assessment and taxation. This conclusion is fully sustained by the following authorities namely, Sangamon and Morgan R. R. Co. vs. The County of Morgan, 14 Ill., 163; Welkey vs. City of Pekin, 19 Ill., 160; Ontario Bank vs. Bunnell, 10 Wend., 186; Hays vs. Pacific Mail Steamship Co., 17 How. U. S., 596; City of Sacramento vs. The California Stage Co., 12 Cal., 134; Orange & Alexandria R. R. Co., vs. City Council of Alexandria, 17 Gratt., 176 and 35 Cal. 282.

The taxes for the year 1870, were levied for both State and county purposes. In respect to the former as we have shown, this was unauthorized. But being rightfully assessed for county purposes, and no tender having been made to the collector for this part of the taxes, he was authorized to make the sale in question. The only mode in which the plaintiff could place the collector in the attitude of a wrong doer, was to tender the sum really due, and then have resisted the collection of the excess. As this was not done, it cannot complain that the sale was void. (Walker vs. City of St. Louis, 15 Mo., 563.)

The judgment of the Circuit Court is therefore affirmed as to the taxes for the year 1870, and under the stipulation, judgment will be rendered in this Court against the appellant for one cent and costs. As to the taxes for the year 1869, the judgment is reversed, and judgment will be rendered here against the respondent for one cent and costs.

The other judges (except Judge Wagner who is absent) concur.

SAMUEL C. MCCORMACK, Admr. of MOSES W. RUGGLES and JACOB M. BIXLER, Respondents, *vs.* LYMAN W. PATCHIN, *et al.*, Appellants.

1. *Municipal corporations—Special taxes—Streets—Re-paving—Assessment of benefits.*—The power to grade and improve streets is a legislative power, and is a continuing one, unless there is some special restraint imposed in the charter of the corporation. It may be exercised from time to time, as the wants of the municipal corporation may require, and of the necessity or expediency of its exercise, the governing body of the corporation, and not the courts, is the judge; and it follows that the power to compel the property owners to pave generally, extends to compelling them to re-pave when required by the municipal authorities. If the first paving of a street is a special benefit to the front proprietor justifying the imposition on him of a portion of the expense, so the removal of an insufficient pavement and the making of a new and sufficient one in its stead, is a matter of special benefit to the front proprietor, although it may be also of general utility.

Appeal from St. Louis Circuit Court.

Clayton F. Becker, for Appellants.

I. The provisions in the city charter of 1867, and the ordinance of the City Council of St. Louis passed in pursuance thereof, in so far as they authorize the re-pavement of a street which had already been paved, and had been paid for by the owners of the adjoining property, and which was in good order and repair, and the assessment of the cost of such re-pavement exclusively upon the same adjoining properties, are unconstitutional and void, as, in effect, prescribing the taking of private property for public use without just compensation. (Hammett vs. Philadelphia, 65 Pa. St., 146.) This case is similar to the case at bar in every respect. (The People, *ex rel.*, Post vs. Booklyn, 6 Barb., 209; Pittsburg vs. Shaffer, 66 Pa., 454.)

II. Local assessments are within the principle of Eminent Domain, where they are not founded upon and measured by equivalent benefits distinctively affecting the property of the persons upon whom the burden is exclusively charged. (*In re.*, Canal Street, 11 Wend., 155; Egyptian Levee Co. vs. Hardin, 27 Mo., 496; Sheehan vs. Good Samaritan Hospital, 50 Mo., 155; Creighton vs. Manson, 27 Cal., 625; Taylor vs Palmer, 31 Cal., 254.)

III. Taxation is bounded in its exercise by its own nature, essential characteristics and purpose. It must be reasonably just and equal in its distribution, and cannot sacrifice individual rights by a palpably unjust exaction. (*In re.* Washington Avenue, 69 Pa. St., 362, where the subject of Local Taxation is fully and ably discussed; Warren vs. Henly, 31 Iowa, 31.)

IV. The matter of benefits as an equivalent to the burdens of local taxation, is purely a juridical question, and is not proper to the City Council considering merely the question of the re-pavement of a street; for if the City Council can re-pave streets and assess the cost thereof exclusively upon the adjoining property, at its discretion, then there is no limit to its power over property; and it may re-pave and assess every day in the year until the whole value of the adjoining property has been transferred, in the name of the special local taxes, from the owners to other persons; which is clearly the exclusive province of the judiciary, operating upon persons who have had their day in court. (Chicago vs. Larned, 34 Ill., 203; Weeks vs. Milwaukee, 10 Wis., 258; Creote vs. Chicago, 4 Chicago Legal News, 106; Thurston vs. St. Joseph, 51 Mo., 510.)

Thos. Grace, for Respondents.

I. The tax bill sued on and read in evidence by the respondents, was *prima facie* evidence of the validity of respondents' claim, and of their right to recover. (Sess. Acts 1871, p. 193, § 1; City to use Creamer vs. Bernoudy, 43 Mo., 552; Hægele vs. Mallinckrodt, 46 Mo., 577.)

II. Sections 9 and 10, Article 8, of the charter of 1867, (Sess. Acts 1867, p. 73,) empower the City Council to pass ordinances for the re-construction of streets. An ordinance passed for such purposes is not unconstitutional or void. (Egyptian Levee Co. vs. Hardin, 27 Mo., 495; City of St. Joseph vs. Anthony, 30 Mo., 537; Keferstein vs. Lankton, *ante*, p. 234; Ruggles vs. Collier, 43 Mo., 355.)

III. The City Council was the sole judge whether or not the street needed to be re-constructed or re-paved, and the Coun-

cil having enacted an ordinance for that species of work, its decision is final on the point. (Young vs. The City of St. Louis, 47 Mo., 492.)

WAGNER, Judge, delivered the opinion of the court.

The sole ground of objection urged against the judgment in this case is, that the ordinance on which the special tax bill was founded was unconstitutional and void. By that ordinance the City Council of St. Louis ordered certain streets to be re-paved, with what is known as the Nicholson pavement, and authorized the cost or expense of the work to be assessed as a special tax against the owners of the ground fronting on the streets where the work was done. The City Charter clearly grants this power, but it is now insisted, that this provision in the Charter and the ordinance passed thereunder are unconstitutional, or, in effect, take private property for public use without making compensation, and that the power of paving at the property holders' expense, once exercised, becomes exhausted.

If the power to re-pave and assess the *costs* and expenses against the adjoining proprietors exists, the exigency which demands its exercise would rest primarily with the council, and would not ordinarily be under the supervision or control of the courts. Whether the power exists or is maintainable at all, is the only question.

The only cases which I have been able to find, sustaining the views urged by the appellant, are those decided in the Supreme Court of Pennsylvania. The first and principal case is Hammett vs. Philadelphia, (65 Penn. St., 146,) in which a majority of the court held, that although the original paving of a street was a local improvement and within the principle of assessing the costs on the lots lying upon it, yet, when a street was once opened and paved, it was thereby assimilated with the rest of the city and made part of it, and all the particular benefits to the locality derived from the improvements were then received and enjoyed.

The learned Judge, who delivered the prevailing opinion,

discussed with considerable fullness the principle underlying the power to make assessments for local benefits.

The opinion consists mostly of generalizations in regard to established and well admitted principles. It is perfectly true that it would be wholly beyond the scope of legislative power, to authorize a municipality to levy a local tax for general purposes. The burdens of the whole community cannot be shifted to the shoulders of one man, who has only an interest in common with all the rest.

The whole theory of local taxation or assessments is, that the improvements, for which they are levied, afford a remuneration in the way of benefits. A law which would attempt to make one person or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation. In effect it would be transferring the property of one individual to another. These are legal truisms, which have long been entertained and firmly established. The line of separation exists between local and general taxation, and the boundary which lies between them is not always very clear or definite.

The case of Hammett vs. Philadelphia shows that it is difficult to draw the true line of distinction between these respective modes of taxation, and the Judge, who wrote the opinion of the majority of the court, finally placed it upon the fact that the act which he was construing relieved the case of all difficulty and showed upon its face that the special taxation authorized was avowedly for a general and not a local object.

The law was for the uses and purposes of the public, and not specially beneficial to any particular class. The power to grade and improve streets is a legislative power, and is a continuing one, unless there is some special restraint imposed in the Charter of the corporation. It may be exercised from time to time as the wants of the municipal corporation may require, and of the necessity or expediency of its exercise, the governing body of the corporation, and not the courts, is the

Judge (Hoffman vs. St. Louis, 15 Mo., 651; Macy vs. Indianapolis, 17 Ind., 267; Gall vs. Cincinnati, 18 Ohio St., 563; Furman Street, 17 Wend., 649; Smith vs. Washington, 20 How. U. S., 135; Plum vs. Canal Company, 2 Stockt., 256.)

As the power to tax and the power to make local improvements at the expense of the property benefited, is, like all the other legislative power of the municipality, a continuing one, unless there be something to indicate the contrary, it follows that the power to compel the property owners to pave generally, extends to compelling them to re-pave when required by the municipal authorities. (Dill. Munic. Corp., § 619.)

In Gurnee vs. The City of Chicago, (40 Ills., 165,) the point was directly decided, and the court held that the power to repair or pave streets, authorized a corporation to remove an old pavement and replace it with a new one of a different description, and assess the expense against the property holders fronting on the street.

The same doctrine is held by the court in Indiana, (City of Lafayette vs. Fowler, 34 Ind., 140.) In the case of the Municipality vs. Dunn, (10 Laian., 57,) the city sued to recover a portion of the cost of re-paving a street in front of defendant's lot. It appeared that the street had been previously paved at the expense of the property, but it was deemed advisable to replace the first pavement with one of a different material.

The defense was that, although the right to assess the property for the first pavement was given, yet the corporation had no right to compel a contribution from the same property for the second pavement. But the court decided that the power to pave the streets was a continuing power, to be exercised when the public good required it, and extended as well to the making of a new in the place of an insufficient pavement as to the one first built, the equity in both cases being regarded the same.

If the first paving of a street is a special benefit to the front proprietor, justifying the imposition upon him of a portion of the expense, so the removal of an insufficient pavement and

the making of a new and sufficient one in its stead, is a matter of special benefit to the front proprietor, although it may also be of general utility.

Every street when it is opened and improved is doubtlessly beneficial to the general public, but the property holder on the street receives a greater and additional benefit in the enhancement of the value of his property. If the street is permitted to get out of repair, so as to render it difficult or dangerous to travel, his property deteriorates as a consequence.

It is then for his advantage and benefit that the street should be repaired or re-construed, and he receives a special benefit not shared by the public at large.

My opinion is that the law is not illegal, and that the judgment should be affirmed.

The other Judges concurring.

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CATHERINE STRAUB, Appellant, *vs.* ALAIS SODERER, Respondent.

1. *Damages—Personal injuries—Negligence—Owner of land—Liability of.*—The owner or occupant of real property is bound, so far as he may be able to do so by the exercise of ordinary care, to keep it in such condition that it will not, by any insufficiency for the purpose to which it is put, injure any passer-by; and he is bound also to use care and diligence to keep the premises in a safe condition for the access of persons who come thereon by his invitation express or implied for the transaction of business. But he is not bound to make the land or buildings thereon safe for any purpose which is unlawful or improper, or for which he could not reasonably anticipate that they would be used, or for which they obviously were never designed. A mere passive acquiescence on the part of the owner or occupant in the use of real property by others, does not involve him in any liability to them for its unfitness for such use. No duty is imposed upon the owner or occupant, to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter, or induced to come upon them by the use for which the premises are appropriated and occupied, or by some preparatory adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter.

Appeal from St. Louis Circuit Court.

Voullaire & Sternberg, for Appellant.

I. "When one either sells or rents to another, premises surrounded by the vendor's or landlord's land, a right of ingress and egress to and from such premises over the property of the vendor or landlords, is by law a part and parcel of the right acquired. This right extends to all who have reasonable cause to use the same."

If a landlord lets premises with an existing nuisance upon it, he is personally responsible to any one who receives any injury thereby. (Addison on Wrongs, 137–138.)

II. The defendant having provided this passage as a means of access to portions of his premises, thereby held out an inducement to persons to use the same, and he could not either himself do or permit another to do any act which would render the way dangerous. (Corby vs. Hill, 4 C. B. N. S., 556; 1 Ellis B. v. Ellis, 168; 10 Allen 374; Addison on Wrongs 141, *et seq.*)

III. Even if defendant was nominally a trespasser, the wife in this case would not be barred from a recovery. (Dailey vs. N. & W. R. R. Co., 26 Conn., 596; 35 New Hampshire, 271; Barnes vs. Ward 9 M. G. & S., 420; Bird vs. Holbrook, 4 Bing., 646.)

A. M. Gardner and S. M. Breckenridge, for Respondent.

I. Deceased was going through this private alley, by a rear entrance, not designed for such use, late at night, after business hours, to borrow a paper from Tegerthoff's corner grocery, or to visit Walters and thus fell down this cellar stairway.

If so, deceased having no connection of any kind with the building or the landlord, can have no greater right certainly than the tenant Tegerthoff or Walters whose customer or visitor he was, or sought to be. (Robbins vs. Jones, 15 C. B. N. S. 220, *et seq.*; Wilkinson vs. Famie, *et al.*, 1 Hurlst. & Colem. 631, 633, 634; Shearm. & Redf. Neg., §§ 498, 501, 2 & 3; Stone & Wife vs. Jackson, 16 C. B., 199; Janis vs. Dean, 11

Morre p. 354; Hardcastle, Adm. vs. South Y. R. R. Co., 4 Hurlst. & N., 65.)

Ewing, Judge, delivered the opinion of the court.

This is an action to recover damages for the death of the husband of plaintiff, based upon the third section of the Damage Act.

The material averments of the petition are, that the defendant at the time of the death of the plaintiff's husband was the owner of a certain tract of land situated in the City of St. Louis, bounded on the South by Morgan street, on the East by 24th street, on the West by 25th street, and on the North by a public alley; that defendant had on said premises a large number of houses that were occupied by different persons as his tenants; that many of said tenants had, as an ordinary and usual means of access to their respective portions of said premises, a certain passage-way which had been provided by the defendant as a common means of access for the use of his tenants, and all persons having lawful occasion to use the same; that said passage-way extended from Morgan street to said alley on the North, and was a thoroughfare; that it was the duty of the defendant to keep and maintain said passage-way and thoroughfare free, clear and unobstructed, and safe for the use of said tenants and all other persons having lawful occasion to use the same. That defendant neglected his duty in this respect, and caused a deep and dangerous pit or excavation to be dug, in consequence of which said passage was rendered insecure and dangerous to persons lawfully using the same, and neglected to fence or properly guard said pit; that during the night Straub, plaintiff's husband, while lawfully passing along said passage without fault on his part fell into said pit and was so injured that he died by reason of the injuries then and there received. The answer admits that the defendant was at the time stated in the petition the owner in fee of the premises therein described, but says that long prior to that time said premises had been leased to various parties, who had then and for a long time previous had had the ex-

clusive possession and control thereof. The other material allegations of the answer are denied. There was a replication to the answer.

After the plaintiff closed her testimony, an instruction was given in the nature of a demurrer to the evidence, wherupon plaintiff took a non-suit.

The motion to set aside being overruled and judgment rendered for defendant, the cause was taken by appeal to General Term where the judgment was affirmed, and the cause is here by appeal from that judgment.

The evidence shows that the defendant had on the premises a number of houses that were occupied by his tenants, the first floor being rented to one set of tenants and the upper floor to others. Those occupying apartments on the ground floor fronting on Morgan street, entered on that street; those occupying the second floor (with few exceptions) entering a central quadrangle or court from which a stairway ascended. This enclosed space, or court, was entered by a covered alley three feet wide from the South, and by one or two from the alley North of the buildings. On the corner of 24th & Morgan street was a grocery and dram shop; next west was a store, in the rear of which was a cellar entrance about three feet wide and six or eight feet long, the entire width of which was occupied by steps. At one time some sort of a railway was on one or two sides of this entrance, but when it was removed does not appear. This entrance led only to the cellar under the store, and was used only by the lessee of the store. There was no evidence of any contract on the part of the landlord to repair. The deceased was found dead, his neck apparently broken, in the cellar entrance, early in the morning—no one knowing the cause of his death. He was not a tenant or occupant of any of the buildings. He lived at a place near by—apart from his family. There was evidence tending to prove that the deceased, about the hour of nine or ten o'clock the night before his death, went to the Grocery store on the corner already mentioned, to get a newspaper, but finding it closed he said he would go and try the back way. There was evidence also

tending to prove that deceased, about ten o'clock the same night, said he was going to see one Walters who occupied the room over the Grocery store, the entrance to which was from 24th street by a way, not leading to or by the cellar where the body of the deceased was found.

Upon this state of facts did the defendant stand in any such relation to the deceased as to impose any duty or obligation upon him which he had failed to discharge? Has he done or omitted to do any act by which a legal duty or obligation has been violated? He is sought to be charged upon the ground, that having provided the means of ingress and egress to and from his premises, he thereby held out an inducement to persons to use the same; and he could not either do any act or permit another to do any act which would render the way dangerous. It may be conceded, that the owner or occupant of real property is bound, so far as he may be able to do so by the exercise of ordinary care, to keep it in such condition, that it will not by any insufficiency (for the purpose to which it is put) injure any lawful passer-by. (White vs. Phillips, 15 Com. B., (N. E.,) 245.) And that he is bound also to use care and diligence to keep the premises in a safe condition for the access of persons who came therein by his invitation, express or implied, for the transaction of business. But it is equally true, that the owner or occupant is not bound to make the land, or buildings thereon, safe for any purpose which is unlawful or improper or for which he could not reasonably anticipate that it would be used. He is not responsible for the consequences of the use of his property in a mode for which it was obviously never designed. (Shear. and Redf. Neg., 563.) A mere passive acquiescence on the part of the owner or occupant in the use of real property by others, does not involve him in any liability to them for its unfitness for such use. One who enters on premises by permission only, without any enticement, allurement or inducement held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pit falls. He goes there at his own risk, and enjoys the license subject to its concomitant

perils. No duty is imposed by law upon the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter. (Bigelow C. J., in Sweeny vs. Old Colony & N. P. R. R. Co., 10 Allen, 368, 372.)

The death of the deceased (if it was caused from falling into the cellar entrance at all) was evidently the result of the grossest recklessness or negligence on his part. Leaving his own house at a late hour of the night, for the purpose it seems of getting admittance to the Grocery store on the corner of the square, and finding it closed at the usual and only proper entrance for visitors or those having business, he endeavors to gain admittance through a dark passage leading to the rear of the building, and in attempting it falls into the entrance to the cellar, and is killed. Or if (as there was some evidence tending to prove) his purpose was to go to the apartments of one Walters, which were immediately above the Grocery, he sought them by a passage through which he could not possibly have reached them. For the entrance to Walters' room was not by the passage-way from Morgan street, but from 24th street, and by means of a stair-way, to which he could have access only from that direction. The entrances to this court, or enclosed space, were provided by the defendant for the occupants of the apartments on the second floors, (or such of them as were entered from that place,) and for guests or those having business at proper and suitable hours—not for trespassers or wrong-doers. The deceased had no right, under the circumstances, to be upon the premises in pursuit of his own pleasure or gratification. And it was for some such purpose as this, as the evidence tended to prove, that he was induced to go there at that time. He went upon the premises at his own risk. The defendant was under no obligation to protect per-

sons from the perils they might encounter from trespassing upon his property; nor is he accountable to them for the consequences of their rashness or folly in doing so. To such he had no legal duty to perform, and he is chargeable with no negligence in omitting precautions for their security or safety.

The cases cited by the counsel for the appellant are those where the injury was received from nuisances near public thoroughfares and on private grounds, to the use of which by the public, the proprietor held out some inducement or allurement. They are inapplicable to the case at bar.

Judgment affirmed. The other Judges, except Judge Wagner who is absent, concur.

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CITY OF ST. LOUIS to use of AUGUST SEIBERT, *et al.*, Respondent, *vs.* THOMAS ALLEN, Appellant.

1. *Practice, civil—Trials—Verdict, general—Several counts—Arrest of judgment—Reversal.*—Where there are several causes of action stated in a petition, and a general verdict is rendered on the whole petition in favor of the plaintiff, if the lower Court refuse to arrest the judgment, this Court will reverse it.
2. *Corporations municipal—Streets, improvement of—Assessments—Personal judgments, validity of—Statutes authorizing.*—Personal judgments against the owner of property in a City, on account of assessments for improvements of streets &c., are null and void, and statutes authorizing such judgments are unconstitutional and void. [City of St. Louis vs. Clemens, 36 Mo., 467, and *Id.* 49 Mo., 552 overruled.]
3. *Practice, civil—Judgments—Interest—Assessments for street improvements in City of St. Louis.*—The 15 per cent. interest in suits on assessments for street improvements should be allowed to the time of the verdict, but the judgment rendered thereon should bear six per cent. interest.

Appeal from St. Louis Circuit Court.

Dryden & Dryden, for Appellant.

I. The Court erred in rendering a personal judgment against the defendant, instead of a judgment *in rem*.

The judgment ought always in these cases to be limited to the property condemned to pay the tax;—upon any other

theory it may be ruinous to own inferior property on a street to be improved.

II. The petition sets out several distinct causes of action, and the verdict for an entire and gross sum cannot be sustained. (Brownell vs. Pacific R. R., 47 Mo., 239.)

III. If the bills were recoverable then the plaintiffs were entitled to recover interest thereon till judgment recovered at the rate of 15 per cent., but after the judgment the sum recovered under the statute would bear but 6 per cent. interest. (W. S., 783, §§ 2–3

F. & L. Gottschalk, for Respondents.

I. As to the power to render a personal judgment. (See Sess. Acts 1866, p. 295; 1867, p. 73, § 10; 1870, p. 451; 1871, p. 193; City of St. Louis vs. Clemens, 36 Mo., 467; City of St. Louis vs. De Noue, 44 Mo., 136; City of St. Louis vs. Armstrong, 38 Mo., 29; Inhabitants of Palmyra vs. Morton, 25 Mo., 593; Egyptian Levee Company vs. Hardin, 27 Mo., 495; City of St. Joseph vs. Anthony, 30 Mo., 538; Fowler vs. City of St. Joseph, 37 Mo., 239; Lockwood vs. City of St. Louis, 24 Mo., 20; Dillon vs. Munic. Corp., p. 617, n. and § 653, and notes § 660; Sheehan vs. Good Samaritan Hospital, 50 Mo., 155; Litchfield vs. McComber, 42 Barb., 288; Dallam vs. Oliver, 3 Gill., 445; Lafayette vs. Fowler, 34 Ind., 140; Taylor vs. Palmer, 31 Cal., 666.)

The City charter provides, that such tax bills shall bear interest at the rate of 15 per cent. if not paid within 6 months from their issue, and shall bear such interest "until paid" (Sess. Acts 1866, p. 296, § 11.)

Vories, Judge, delivered the opinion of the court.

This action was brought by the respondents against the appellant in the Circuit Court of St. Louis County, to recover the amount of two several tax bills for work done by the respondents under a contract with the City of St. Louis, in curbing, guttering and macadamizing, done on what is called the Gravois road, in front of and adjoining certain lots of ground belonging to appellant, and upon which said lots said tax bill

were assessed as a special tax under the charter and ordinance of the City of St. Louis.

There were two counts in the petition, one on each of the two tax bills.

It was substantially charged in the 2d count of the petition that the appellant was the owner of a lot of ground lying and being in the City of St. Louis, to-wit: All that lot or parcel of ground, which is bounded East by Gravois road, North by line running from the point where the north line of Gravois road intersects the western line of Second Carondelet avenue westwardly to Jefferson avenue and parallel with said Allens south line, South by Allens south line, and West by Jefferson avenue, in blocks numbered 785-1343-1344 and 1345 of said city. That said city by authority of ordinance numbered 5777 & 5825 passed in pursuance of its charter, did contract with respondents to do certain curbing, guttering and macadamizing on Gravois road, in front of and adjoining the above described property of appellant, and did also by ordinance No. 5399, provide for the material, with which and the manner and general regulations in and under which said work was to be done; that in pursuance of said contract and ordinance said respondents did work and labor, and furnished materials, to the amount of seventeen hundred and thirty 96–100 dollars, the particulars of which will appear by the certified account filed. That after the work was completed said sum of $1,730.96–100 had been assessed as a special tax against said property by the said City of St. Louis, and that by virtue of an act of the General Assembly of the State entitled "An act supplementary to the several acts incorporating the City of St. Louis, approved January 16th 1860," and also by virtue of an act of said assembly entitled "An act to revise the City Charter of the City of St. Louis, approved March 19th, 1866, said respondent is made liable for the same, and that the Engineer of said city also by virtue of said recited acts has issued and delivered to respondents a certified bill of such assessment against said property in the name of appellant as the owner thereof, which said bill is herewith filed. By means

of all which the same became a lien against said property, in pursuance of the before recited acts. That said amount of $1,730.96–100, although demanded, remains unpaid and still due. Wherefore judgment is prayed for the amount of the tax bill with interest, &c., and that the lien against said lot be enforced, &c.

The other count of the petition is for another tax bill, and is assessed against the property, but in other respects very nearly similar to the one here set forth.

The answer of the defendant to the different counts of the petition were substantially the same. The answer denied, that Gravois road was a public highway, or that the ground on which the work was done, was or is part of the Gravois road or of any public highway, but that the said ground was at the time and still is, the real estate of the appellant, in no wise condemned to or otherwise dedicated to the public for the purpose of a public highway; that neither the city or respondent had any right to improve the same, or to charge the appellant or his property therewith. He denies that he, at the time of the doing of the work charged for, owned any such ground in city blocks numbered 1343-1344-1345 and 785, as is described in the petition. He denies that ordinance 5777 and 5825 were passed in pursuance of the charter of the city, or that it gave any authority to the city or its officers, to procure respondents to perform said work thereon, or that they in pursuance of the pretended contract, or of any valid contract, did work and labor or furnished material to the amount of $1,730-96–100 in front of, or adjoining the alleged property, or any property of respondent, or that the Engineer of said city ever computed the cost of the pretended work and assessed the same as a special tax against any adjoining property of appellant, or made out and delivered to respondents a certified bill of the same against said property for the amount against the same, as averred by respondents; or that said sum was demanded of appellant as alleged; or that said sum or any part thereof is a lien against the said property or any property of appellant, or that he became liable to pay the same.

To this answer a replication was filed denying, that said Gravois road was not a public highway, or that the city had no right to improve the same, and denied the affirmative allegations in the answer.

A trial was had on the issue made in said Circuit Court in June, 1871, at Special Term.

The cause, after being heard, was submitted to a jury, who found for the plaintiff. The entry on the record being as follows:

"Now at this day come again said parties by their respective attorneys, and the jury sworn and impanneled herein also come, and the trial of this cause progressed, and being concluded, the jurors aforesaid upon their oaths aforesaid find the issue joined in favor of said plaintiffs, and assess their damages at the sum of five thousand five hundred and fifty-six dollars and twenty-seven cents."

Judgment is then rendered by the court for the amount found by the jury, which said amount it is provided shall be enforced as a lien against all of the property named in both counts of the petition, thereby making the amount named in each tax bill, not only a lien on the land against which it is assessed, but also against the land named in the other account or tax bill.

After the rendition of this judgment, the defendant filed his several motions for a new trial, and in arrest of the judgment. In the defendant's motion for a new trial, it is set out as a cause for a new trial, amongst other causes, that the verdict of the jury is against the law, and against the weight of the evidence.

It is set out as cause for arresting the judgment, amongst other things, that "the verdict of the jury is not responsive to the issues. That the petition contains two distinct counts, in which distinct property is sought to be charged by the demands stated in said counts respectively, and yet the verdict is joint and the judgment is joint, charging the whole or joint demand on each several piece of said property."

During the pendency of these motions, the plaintiffs and respondents here appeared in court, and remitted and released

so much of said judgment, as attempted to enforce a lien against the property therein named, and as described in the petition; whereupon the court rendered a general judgment against the defendants for the amount named in the verdict, and ordered execution to issue thereon, after which the court overruled defendant's motions for a new trial and in arrest of the judgment. To the opinions of the court in overruling said several motions for a new trial, and in arrest of the judgment, the defendant at the time excepted. The cause was then appealed to the General Term of the Circuit Court of St. Louis County, where the said judgment so rendered by the Special Term of said court was affirmed, and the defendant has appealed to this court.

With the views that I have taken of this case, it will only be necessary to examine two questions growing out of the record in this case: 1st Was it proper for the court below to render a judgment upon the general verdict found by the jury upon the whole petition, without finding separately on each count in the petition; 2d Was the court authorized to render a general personal judgment against defendant upon the tax bills sued on and described in the petition?

In reference to the first question above stated the rule is, that where the separate counts of the petition each state a separate, different, and distinct cause of action, a general verdict on the whole petition is insufficient, and the damages should be assessed separately on each cause of action, as stated in the several counts; but if the counts are substantially for the same cause of action, so that a recovery on any one of them would be a recovery on the other, and where a recovery on the cause stated in one count would be a bar to any recovery stated in the other count, then a general verdict will be sufficient. (Brownell vs. the Pacific R. R. Co., 47 Mo. 139; Mooney vs. Kennett, 19 Mo., 551.)

In the case of Pitts vs. Fugate, 41 Mo., 405, it is expressly held, that where there are several causes of action stated in the petition, and a general verdict rendered on the whole petition in favor of the plaintiff, the judgment should be arrest-

ed, and if the court below refuse to arrest the judgment, it will be reversed. The case of the State *ex rel.*, Collins vs Dulle, *et al.*, 45 Mo., 269, is to the same effect.

The case now being considered comes peculiarly within the rules stated in the above cited cases. Here there are two counts, they are founded on two separate, distinct causes of action, and each cause of action is alleged to be a lien on a distinct and separate lot or parcel of land; hence no intelligent judgment could be rendered by the court on the verdict found by the jury. The judgment must for that cause alone be reversed.

It may seem useless to examine the other question above stated, but as it has been earnestly and ably argued, and as the case must be sent back for a re-trial, it may be useful also to pass upon that question.

It is contended by the respondent, that this question has been directly settled by this court by various decisions heretofore rendered, and that said question has also been settled by the adjudged cases in other States. Several cases are referred to, where personal judgments have been rendered upon assessments, which are contended to be identical in their legal effect with the ones sued on in this case.

In the case of the City of St. Louis to the use of McGrath vs. Clemens, 36 Mo., 467, it is certainly held by the court, that a personal judgment is proper in a case like the one under consideration; but the point made in that case was not whether the Legislature had the constitutional power to authorize a municipal corporation to make local improvements in their territorial limits, and charge the cost thereof to the adjoining lots or land, and make the owners of such land or lots *personally* liable to pay for said improvements, on account of any supposed benefit that the improvements might be to the property, and then by a general personal judgment against the owner of the lot sell not only the lot or lands against which the assessment was made, and which was supposed to be benefited, but also any other property of the owner to pay the judgment; but the point raised and decided

in that case was, whether under the state of the pleadings in that case a general personal judgment could be rendered, or whether, by the language of the statute and ordinances under which the work was done, a personal judgment could be rendered against the owner of the lots charged with the assessment. The constitutional power to authorize the rendition of a personal judgment in such case was not considered or argued, and the same may be said as to the cases of the City of St. Louis to the use of Lohrum vs. Coons, 37 Mo., 44; Fowler vs. City of St. Joseph, 37 Mo., 228; and The Inhabitants of Palmyra vs. Morton, 25 Mo., 593. In none of these cases, nor in any other case in this State to which we have been referred, was the constitutional power of the Legislature to authorize municipal corporations to make these local improvements, and assess the cost against the adjoining property, and then recover a personal judgment against the owner of the property for the amount assessed, ever brought directly in question or discussed. In reference to the adjudged cases on this subject in other States it may be remarked, that the Constitutions of most of such States contain provisions on the subject of taxations and assessments not to be found in our Constitution. By the Constitution of Ohio it is provided, that "Laws shall be passed, taxing by a uniform rule all moneys, &c., and also all real and personal property according to its true value in money." It is also provided, that the General Assembly is required to "provide for the organization of cities and incorporated villages by general laws, and to restrict their power of taxation, *assessments*, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power." In the case of Hill vs. Higdon, 5 Ohio State, 243, it is held by the Supreme Court of Ohio, that the first clause of the Constitution above referred to, furnishes the governing principle for all laws levying taxes for general revenue purposes, whether for State, county, township, or corporation purposes, and that it "requires a uniform rate per cent. to be levied upon all property, according to its true value in money." It is further held, that no law could have

been passed by the Legislature under that clause of the Constitution authorizing the cost of local improvements to be assessed against the adjoining property, but that resort must be had to the last named clause of the Constitution above set forth for any such purpose. The learned Judge delivering the opinion of the court, makes a distinction between the words taxation as used in said clause and the word *assessment* as used in the same clause; the one, it is said, refers to taxation for general purposes, while the other refers to assessments made for local purposes upon property in the vicinity of the improvement made and supposed to be benefited thereby; that it is under this last clause and that only, that the Legislature gets powers to pass laws authorizing these local improvements and assessments.

Our Constitution has no provision relating to assessments by cities and incorporated towns, but simply provides, "that all property subject to taxation ought to be taxed in proportion to its value." If the power of municipal corporations to make these local improvements and make special assessments against the adjoining property for the cost thereof, in proportion to the front foot or otherwise, was a new question in this State, it might be difficult to find any sufficient warrant in our Constitution to justify such assessments or taxation, but this method of taxation has been recognized and acted on too long to now be questioned, but it is certainly the duty of the courts to see that its exercise is kept within proper limit.

The Constitution of California, so far as it relates to taxation, is substantially the same as that of Ohio. In the case of Taylor vs. Palmer, 31 Cal., 240, these constitutional provisions are discussed and construed, and in that case it is held, that the words "taxation" and "assessments," as used in the Constitution, do not have the same meaning; that the power of taxation is a power which the Legislature takes from the laws of its creation, to impose taxes upon the property of the citizens for the support of the Goverment, and that this tax must under the Constitution be imposed equally upon all property according to its value; that the word "assessments"

is used in the Constitution to represent the local burdens imposed by municipal corporations upon property bordering upon unimproved streets for the purpose of paying for the improvement, and laid with reference to the supposed benefit that the property receives by the improvement.

In that case it is further held by a majority of the court, that under the *general taxing power* in the Constitution named, the Legislature has no power to pass laws, authorizing towns or cities to improve streets, and make the owners of the adjoining property pay for it, either by a tax on the adjoining property or otherwise, and that where the improvements of the streets, &c., are authorized under the power to regulate the *assessments* of towns, cities, &c., and the cost thereof to be charged to and assessed against the adjoining property, no personal judgment can be rendered against the owner of such adjoining property, although the act of the Legislature authorizing the work to be done expressly provided that the judgment should be as well a personal one as a judgment against the property assessed with the cost of the work done. The learned Judge in delivering the opinion of the court says: "The judgment in this case follows the form prescribed by the practice act in actions for the foreclosure of mortgages; it determines the amount to be recovered, declares a lien upon the lot in question, and directs it to be sold and the proceeds of the sale to be applied to the payment of the amount recovered, and the surplus if any to be paid to the defendants. If there is a deficiency, the sheriff is directed, to report the amount, and the Clerk is directed to docket the same as a personal judgment against the defendant, drawing interest at the rate of ten per cent. per annum, to be collected by execution. This form of judgment is expressly authorized by the statute, &c., but we are of opinion, that the statute is unconstitutional so far as it affords relief beyond the fund to be realized by a sale of the property assessed. In Emery vs. Bradford, 29 Cal., 88, we held, that a personal judgment was authorized by the statute, but whether the statute was in that respect constitutional was

not considered. But be that as it may, it is clear that it was not decided. * * * To say that the owner of land bordering upon an improved street can be made personally responsible for the payment of the improvement, is equivalent to saying, that his entire estate, real, personal, and mixed, whether bordering upon the street or remote from it, whether benefited or not, shall be held responsible for the tax.

Two of the judges dissented from the opinion of the court in that case, holding that a personal judgment was proper, but they conceded that all that could be collected on the judgment would be the value of the property against which the assessment was made and which was supposed to be benefited by the improvement. We are however, left uninformed as to how the sheriff or other officer, having the execution in charge issued on the personal judgment, would ascertain when he had collected from the defendant in the execution the exact *value* of the property, against which the assessment was made. The only practical way to ascertain this fact would be to authorize the sale of the property charged, and, if it did not bring the whole amount of the execution, to stop. This would be exactly the same thing in its results as to render a judgment against the property only. It is well settled by the decisions of this court, that assessments like those sued on are not regarded as a tax, but as an assessment for improvements, and are not considered as a burden, but as an equivalent or compensation for the enhanced value which the property derived from the improvement. Sheehan vs. The Good Samaritan Hospital, 50 Mo., 155, and cases cited. If it is considered, that the property receives a benefit from the improvement equivalent to the cost of the work done, why could it become necessary or proper to have a personal judgment against the owner of the property for the assessment, or why resort to other property to collect the amount. In the case of the City of Carondelet to the use &c., vs. Picot, 38 Mo., 125, the suit was brought to collect an assessment made against property belonging to Picot for street improvements made adjoining the property. The provisions of the law and ordinances

in force when the work was done, only authorized the assessment to be collected as other taxes were collected, no provision being made by which a suit for the recovery of the assessment could be brought. It was suggested in that case that a suit might be necessary in order to collect the assessment, as the property assessed might not be sufficient to pay the assessment. To this Judge Wagner, in delivering the opinion of the court, says: "The city makes out the apportionment, levies the assessment, and enforces the collection.

"The city has a lien on the property, the contractor has not. It may be said, that the property may not be sufficient to pay the assessment; it is a sufficient answer to this to say, that it will not be presumed, that it was ever intended that a corporation in the exercise of this high prerogative power should absorb the whole value of a person's property, and then come on him for the deficit."

The very idea of such an assumption on the part of either the City, or the State Legislature, would be sufficient to startle one who had even the most crude notion of the objects and purposes of a just or enlightened government. The idea that a City could improve a street, and assess the property, *benefited* thereby, and sell the entire property, and then go on the owner of the property, who may reside out of the City, and sell his property there to pay the balance of the assessment, and this all in consideration of the benefit conferred on his property, which was already sold, would seem at least in its results like taking the property of the owner and converting it to public use without any just compensation. I do not believe that by this indirection you can do that which is forbidden by the Constitution if directly done. If a personal judgment can be rendered in such case, all this may happen. It is true it is not likely to happen, but the fact, that it may possibly happen, is enough to condemn the law.

The case of Wells vs. The City of Weston, 22 Mo., 384, was a case in which the Legislature of the State had authorized the City of Weston by a provision in its charter to levy and collect a tax on all lands situate within one-half mile of the

city limits. Under this charter the City proceeded to levy a tax on the land of Wells, situate within one-half mile of the City Limits. The City Collector sold the land of Wells for the tax levied, the land was purchased by the City, and the collector threatened to make a deed to the City for the land. Wells filed a petition to set aside the sale made by the collector of his lands, so as to remove the cloud about to be placed upon the title to his land, on the ground that the Legislature had no power to pass the law to subject his lands outside the city limits to taxation by the city authorities. It was held by the court, that the act so far as it affected the lands of Wells outside of the city limits was unconstitutional and void. The act was not held void merely because it was prohibited by any express provision of the Constitution, but as well because "the very purpose of instituting government is the protection of the citizen in his person and property, and the power to violate these rights would seem to be quite beyond the lawful authority of any government," and because the Legislative department of the government could not arbitrarily take the property of one citizen and give it to another, and of course could not authorize others to do so. The Constitution prohibits the taking of private property for public use without just compensation.

It is submitted, that the principle decided in that case is in some respects identical with the principle involved in the case under consideration. If you can assess the lot of a non-resident of the city for improvements made in one of the streets in the vicinity of the lot, and sue the owner of the lot, get a personal judgment, sell the lot for less than the amount of the judgment, and collect the balance from the owner out of the other property without the city limits, you have in such case certainly taken his property and converted it to the use of the City, and if he has in such case received any just compensation within the meaning of the Constitution, it is difficult to perceive it. This would enable the City to do that by an indirection, which could not be done directly. If we construe the statute in reference to these as-

sessments to authorize a personal judgment, by which such results might follow, it would make the statute unconstitutional and void. In a late case decided by this court the question, as to whether a personal judgment could be rendered under a statute almost exactly like the statute governing the case under consideration, was discussed, and the court held that no personal judgment could be rendered. The learned judge, in delivering the opinion of the court in that case, overrules the cases of the City of St. Louis vs. Clemens, 36 Mo., 467, and the same case 49 Mo., 552, and says: "The construction given above is not only more reasonable, but I greatly doubt whether the Legislature has the power to authorize a general charge upon the owner of local property, which may be assessed for its special benefit, unless the owners of all taxable property within its municipality are equally charged." * I think not only that the learned Judge's doubts were well founded, but I have no doubt, that if the statute is construed so as to authorize a personal judgment against the owner of the property in such case, so far as it attempts to authorize a personal judgment, it is unconstitutional and void. It is objected by the appellant, that the judgment rendered in this case is made to bear interest at the rate of 15 per cent. per annum after its rendition.

This objection I think is well taken. These assessments, upon which the suit is brought, are not contracts to pay interest at a higher rate than six per cent per annum within the meaning of our statute on that subject, (W. S., 783, §§ 2, 3,) but they are rather obligations imposed by law, and the interest of 15 per cent. authorized is more in the nature of a penalty than a contract, which is to be included by the jury in their verdict to the date of its rendition, but the judgment rendered therefor should only bear six per cent. interest.

The question as to whether the work done, for which the assessments were made, was done in or upon a public highway by prescription, is a question of fact which was fairly presented to the jury in the instructions given by the court un-

* Neenan v. Smith, 50 Mo. 530.

der the evidence in the cause, and is therefore not open for examination here.

It is also insisted by the appellant in this case, that the petition is wholly insufficient to uphold a judgment. It is not however necessary that we should examine any further points made, and argued in this case.

The petition, it may be remarked, would have been clearly bad on demurrer, but the defendant, filed an answer in which definite issues were made. In cases where the allegations of the petition are indefinite and want certainty, after verdict, with our liberal statute of amendments, the defects are, I think, cured.

Judge Wagner absent. The other Judges concurring, the judgment of the Circuit Court is reversed, and the cause remanded.

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VIRGINIA L. MINOR, *et al.*, Plaintiffs in Error, *vs.* REESE HAPPERSETT, Defendant in Error.

1. *Laws, conflict of—Constitution of Missouri—Registration laws—Constitution of the United States—14th Amendment.*—There is no conflict between the Constitution of the State and the registration laws, restricting the right of voting to male citizens, and the Fourteenth Amendment to the Constitution of the United States.

Error to St. Louis Circuit Court.

John M. Krum, Francis Minor and John B. Henderson, for Plaintiffs in Error.

This is an action, brought by the plaintiff, against the defendant, a registering officer, for refusing to register her as a lawful voter.

The defendant demurred to the petition. The defense, in substance, is based upon the Constitution of Missouri, which provides, (Art. 2, Sec. 18,) that "every *male* citizen of the United States, &c., * * * shall be entitled to vote;"—

and also upon the registration law of said State, approved March 10th, 1871, to the same effect; and it is claimed, therefore, that the defendant was justified in refusing to register the plaintiff, on account of her sex.

The plaintiff, however, denies the validity of this clause of the Missouri Constitution, and the registration act based thereon, and contends that they are in violation of, and repugnant to, the Constitution of the United States, and particularly to those articles and clauses thereof, which she has specified in her petition.

It is admitted, by the pleadings, that the plaintiff is a native-born, free, white citizen of the United States, and of the State of Missouri, that the defendant is a Registrar, qualified and acting as such—that the plaintiff, in proper time, and in proper form, made application to him to be registered, and that the defendant refused to register the plaintiff solely for the reason that she is a *female*;—(and that she possesses the qualifications of an elector, in all respects, except as to the matter of sex, as before stated.)

The question is thus broadly presented of a conflict between the Constitution of the State of Missouri and that of the United States, as contemplated by the 25th section of the Judiciary Act of 1789, and the supplementary act of February 3rd, 1867.

The elective franchise is a privilege of citizenship, within the meaning of the Constitution of the United States.

A limitation not found there, nor authorized by that instrument, cannot be legally exercised by any lesser or inferior jurisdiction.

The subject of suffrage, (or the qualifications of electors, as the Constitution terms it,) is simply remitted to the States by the Constitution, to be regulated by them; not to limit or restrict the right of suffrage, but to carry the same fully into effect. There can be no division of citizenship, either of its rights or its duties. There can be no half way citizenship. Woman, as a citizen of the United States, is entitled to all the benefits of that position, and liable to all its obligations, or to none.

The States can no more deprive a citizen of the United States of one privilege, than of another, except by the "law of the land." There is no security for freedom, if this be denied. To use the language of Mr. Madison, such a course 'violates the vital principle of free government, that those who are to be bound by laws, ought to have a voice in making them."—Madison Papers, vol. 3—Appendix, p. 12.

As Mr. Justice Story says:—"The States can exercise no powers whatsoever, which exclusively spring out of the existence of the National Government, which the Constitution does not delegate to them. * * * No State can say that it has reserved what it never possessed."—Commentaries, §§ 624-627.

We say, then, that the States may regulate, but they have no right to prohibit the franchise to citizens of the United States.

As to "Bills of Attainder"—"Due process of Law," &c.

"No State shall pass any bill of attainder," &c. "A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text books, judicial magistracy, it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise, and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense.

"To make the enjoyment of a right depend upon an impossible condition, or upon the doing of that which cannot legally be done, is equivalent to an absolute denial of the right under any condition. The effect, and not the language of the law in such case, must determine its constitutionality. It would not be doubted for a moment that a law expressly

denying the elective franchise to any person upon whom the Constitution confers it, would be unconstitutional. Why, then, is a law less objectionable, which, although not expressly and directly, yet no less certainly, denies the right," &c.—(Davies vs. McKeeby, 5 Nevada Rep. 7, 371; See also, The State vs. Staten, 6 Caldwell's Rep., p. 243; See also, Rison vs. Farr, 25 Ark. Rep., p. 175; Winehamer vs. People, 13 N. Y., 378; State vs. Symonds, 57 Maine, 150; Green vs. Briggs, 1 Curtis, 311; Embury vs. Connor, 3 Coms., 511; Huber vs. Riley, 53 Penn., 112; Cool. Cons. Limit.)

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not therefore to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeiture, in all possible forms would be the law of the land." (4 Wheat., 581.)

That the elective franchise is a privilege of citizenship, we have the authority of Judge Washington, for he says: "What are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental; which belong of right to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent and sovereign. What those fundamental principles are, it would perhaps be more tedious than difficult to enumerate.

"They may, however, be all comprehended under the following general heads: protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain hap-

piness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. The elective franchise, as regulated and established by the laws or Constitution of the State in which it is to be exercised.—(Corfield vs. Corryell, 4 Wash. C. C., 380.—Cited and approved in Dunham vs. Lamphere, 3 Gray, 276, (Mass.;) Bennett vs. Boggs, Baldwin Rep., 72.)

Smith P. Galt, for Defendant in Error.

The 14th Amendment to the U. S. Constitution does not apply to this case.

Vories, Judge, delivered the opinion of the court.

This was an action brought in the St. Louis Circuit Court by husband and wife against the defendant, who was a registering officer, for refusing to register Virginia L. Minor, the wife, as a lawful voter.

The defendant demurred to the petition on the ground, that the said Virginia had no right to vote at the general election held in November, 1872, referred to in said petition, and on other grounds not necessary to mention. The defense being based upon the Constitution of the State of Missouri, which provides, that "every male citizen of the United States, &c., * * * * shall be entitled to vote at such election for all officers, State, County and municipal, made elective by the people, or any other election held in pursuance of the laws of this State;" and upon the registration law of said State, approved March 10, 1871, to the same effect, and requiring the registration officers to register such voters, &c.; and it is claimed therefore, that the defendant was justified in refusing to register the plaintiff (Virginia L. Minor), on account of her sex.

The validity of this clause of the State Constitution, and the registration act based thereon, is denied by the plaintiffs, they contending that said constitutional provision and the act of the Legislature in pursuance thereof are in violation of the Constitution of the United States, and particularly to the clauses thereof specified in the petition.

There is no question made in reference to the sufficiency of the petition in other respects, provided that females have a right to be registered as voters, and vote at elections held under the Constitution and laws of the State, notwithstanding the provisions of the Constitution and laws of the State to the contrary thereof.

The question presented then is, whether there is conflict between the Constitution of the United States and the Constitution and laws of the State of Missouri on this subject. That the different States of the Union had a right, previous to the adoption of what is known as the 14th Amendment to the Constitution of the United States, to limit the right to vote at election by their Constitutions and laws to the male sex, I think cannot at this day be questioned. The (I may say) universal construction of the Constitution of the United States on this subject, and the almost universal practice of all of the States in reference to this subject, from the adoption of the Constitution to the present time, ought to be sufficient to prevent the necessity of an investigation of this subject now. There are certainly some questions that the courts of the country have a right to consider as settled, and that question I think is one of them.

By the 14th Amendment to the Constitution it is provided as follows:

"Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

"Sec. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians, not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the

United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the *male* inhabitants of such State, being 21 years of age, and citizens of the United States, or in any way abridged except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion, which the number of such *male* citizens shall bear to the whole number of male citizens 21 years of age in such State."

When we take into consideration the history of the times, in which this amendment was originated, and the circumstances, which in the view of its originators, produced its necessity, we will have but little trouble it seems to me to give it its proper interpretation. The whole slave population of the South had just been freed, and were about to enter into an entirely new relation with the balance of society, and were to assume new obligations and responsibilities. In this changed state of affairs, it was thought by those, who originated and adopted this amendment, that it was absolutely necessary, that these emancipated people should have the elective franchise in order to enable them to protect themselves against unfriendly legislation in which they could take no part; that unless these people had the right to vote and thus protect themselves against oppression, their freedom from slavery would be a mere mockery, and their condition but little improved. It was to remedy this that the 14th Amendment to the Constitution was adopted. It was to compel the former slave States to give these freedmen the right of suffrage, and to give them all of the rights of other citizens of the respective States, and thus make them "equal with other citizens before the law." There could have been no other intention to abridge the power of the States to limit the right of suffrage to the male inhabitants. It was only intended to give the freedmen the same rights that were secured to all other classes of citizens in the State, and that if the other male inhabitants of the State over the age of twenty-one years enjoyed the right of suffrage, so should the males amongst the freed-

men over the age of twenty-one years enjoy the same right; it was not intended that females, or persons under the age of twenty-one years, should have the right of suffrage conferred on them. This is not only shown by the history of the times when the amendment was adopted, and the circumstances which produced it, but by reference to the 2d Section of said Amendment it will be seen, that the right to restrict the right of suffrage to the male inhabitants by a State is clearly recognized. If "the right to vote, &c., is denied to any of the *male* inhabitants of such State being twenty-one years of age &c.," is the language used: this clearly recognizes the right, and seems to anticipate the exercise of the right, on the part of the States to restrict the right of suffrage to the male inhabitants.

I think the Circuit Court committed no error in sustaining the demurrer to the petition.

Judge Wagner absent. The other judges concurring, the judgment of the Circuit Court is affirmed.

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STATE OF MISSOURI Respondent, *vs.* WILLIAM BURGDORF, Appellant.

1. *Crimes and punishments—Rape—Passive policy—Half-way measures.*—The crime of rape can only be committed where there is on the part of her on whom the attempt is made, the utmost reluctance, and the utmost resistance. A passive course of conduct, or slight resistance is not sufficient, there must be no consent, however reluctant.

Appeal from St. Louis Circuit Court.

Jecko and Hospes, for Appellant.

SHERWOOD, Judge, delivered the opinion of the court.

Burgdorf was indicted for the crime of rape alleged to have been perpetrated by him on Anna Rorschach, a girl about sixteen years of age.

The trial of the cause resulted in a verdict of guilty, and

judgment accordingly, and after moving unsuccessfully for a new trial, this case comes here by appeal.

The only ground relied on for a reversal, is that the verdict is entirely unsupported by the evidence.

Without setting forth in detail the disgusting particulars of this accusation, it is sufficient to say with regard to the salient points in the evidence, that whether we consider the *place* of the reputed offense, (a house but a few feet distant from one in which two families were then living,) the early hour in the evening at which it is said to have occurred, or the *manner* of its alleged perpetration, (viz: the seizure by the defendant of both of the girl's hands, in *one* of his, the holding of them behind her back, and while thus still holding them seating himself in a chair, raising one of her legs with one hand, and the other leg with his *foot*, pulling her "*astraddle*" of his lap and consummmating the outrage, and this too, while holding to the table on which was a lighted lamp, with his *other* hand, and thus preventing her from pushing him over, as she says, the second time,) the story of the girl is to the last degree improbable.

In addition to this, she is contradicted by Hammill, a witness on the part of the State who was peeping through a crack of the door, only some seven or eight feet distant, and who reiterates the statement that though he heard a kind of screaming at first, the girl made no outcry *while* the offense was being perpetrated; and that after defendant laid down his pipe and took her by the arm, and placed her in the position above referred to, she seemed to be "satisfied," and that she also caught hold of the table with the lighted lamp on it; and the lamp *stood still.*

And Ehert, though not so positive in his statements as to outcries, as Hammill, says he heard no screaming while he and the former were together at the door.

Further than that, the physician who examined the girl the next day, stated that he found no bruises on her person, and that *he got her* to make statements respecting the alleged offense.

In trials of this character, the admonitory advice of Lord Hale, that this is an accusation easily made, hard to be proved, and still harder to be defended by one ever so innocent, should never be forgotten.

Here, the testimony of the party said to be injured, is not only unsupported by any other evidence, but in its more prominent and essential features, is flatly contradicted. And she never makes any complaint only as it is extorted from her by the interrogatories of the medical examiner.

Besides the *method* of the sexual act in question, can scarcely be credited, unless *consent* were one of the ingredients of the transaction. Thus, where the prisoner worked himself under the prosecutrix, and in this way had connection with her, it was held no rape, and this evidently upon the ground of extreme improbability.

The crime under consideration, can, in the language of one the authorities, only be committed where there is on the part of her on whom the attempt is made, "the utmost reluctance, and the utmost resistance."

The "*passive policy*" or a mere *half-way* case, will not do.

It certainly must have been a *very amicable struggle* indeed, which would inflict no bruises on the girl; cause no outcries during its continuance, and leave the lighted lamp standing still upon the table; which in the effort for supremacy, was grasped by both contestants.

In a word, this was not the conduct of a woman jealous of her chastity, shuddering at the bare thought of dishonor, and flying from pollution. Had it not been for the *tell-tale crack* in the door, we doubtless would have never heard from this case.

The jury committed the very common error, of allowing the heinousness of the charge to hurry them on to the conclusion reached in their verdict. But *accusation* and *guilt* are not yet synonymous—some attention has still to be paid to the rules of evidence; and the court should not have permitted the verdict,

"Baseless as the fabric of a vision,"

Judgment reversed and cause remanded. The other Judges concur.